

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.**

FILED BY CLERK

OCT 31 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

DEWAYNE B.,

Appellant,

v.

ARIZONA DEPARTMENT OF
ECONOMIC SECURITY and
LAYLA B.,

Appellees.

2 CA-JV 2008-0058

DEPARTMENT A

MEMORANDUM DECISION

Not for Publication

Rule 28, Rules of Civil

Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF GRAHAM COUNTY

Cause No. JD-2007-010

Honorable D. Corey Sanders, Judge

AFFIRMED

David Griffith

Safford
Attorney for Appellant

Terry Goddard, Arizona Attorney General
By Claudia Acosta Collings

Tucson
Attorneys for Appellee Arizona
Department of Economic Security

PELANDER, Chief Judge.

¶1 Dewayne B., father of Layla B., born in September 2005, appeals from the juvenile court's order terminating his parental rights to his daughter based on her removal from his custody,¹ her return, and her subsequent removal within eighteen months. *See* A.R.S. § 8-533(B)(11).² Dewayne argues there was insufficient evidence to support the court's finding that he was unable to discharge his parental responsibilities as § 8-533(B)(11)(d) requires. For the reasons stated below, we affirm.

¶2 A juvenile court may terminate a parent's rights if it finds by clear and convincing evidence any statutory ground for severance exists and if it finds by a preponderance of the evidence that severance is in the child's best interests. A.R.S. §§ 8-533(B), 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005).

¹The mother, whose parental rights were also terminated, is not a party to this appeal.

²Termination pursuant to A.R.S. § 8-533(B)(11), requires the following:

- (a) The child was cared for in an out-of-home placement pursuant to court order.
- (b) The agency responsible for the care of the child made diligent efforts to provide appropriate reunification services.
- (c) The child, pursuant to court order, was returned to the legal custody of the parent from whom the child had been removed.
- (d) Within eighteen months after the child was returned, pursuant to court order, the child was removed from that parent's legal custody, the child is being cared for in an out-of-home placement under the supervision of the juvenile court, the division or a licensed child welfare agency and the parent is currently unable to discharge parental responsibilities.

On review, we “accept the juvenile court’s findings of fact unless no reasonable evidence supports those findings, and we will affirm a severance order unless it is clearly erroneous.”

Jesus M. v. Ariz. Dep’t of Econ. Sec., 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002).

¶3 We view the evidence in the light most favorable to upholding the juvenile court’s ruling. *See Michael J. v. Ariz. Dep’t of Econ. Sec.*, 196 Ariz. 246, ¶ 20, 995 P.2d 682, 686 (2000). Layla was born “substance-exposed,” and the Arizona Department of Economic Security (ADES) took her into temporary physical custody four days after she was born. Child Protective Services (CPS) filed a dependency petition just a few days later (2005 petition), alleging the mother had tested positive for methamphetamine the month before Layla’s birth and for marijuana at the time of birth and that Dewayne, who has a history of drug-related criminal charges, was unable or unwilling to parent Layla because of his substance abuse. The parents were provided services, the adequacy of which Dewayne does not challenge on appeal, that included drug testing, psychological evaluations, counseling, parenting classes, home studies, and supervised visitation with Layla.

¶4 Layla was subsequently returned to her parents, removed again, and ultimately returned to them before the 2005 petition was dismissed in January 2007. In August 2007, pursuant to a search warrant based on information that drug sales had taken place in March 2007 from the family home, officers seized drug paraphernalia and illegal substances from the master bedroom of the home, a room to which Layla had access. During the search, individuals at the residence reported to the officers that Dewayne had been smoking

methamphetamine with them and that he had fled the home when the officers had arrived. In August 2007, CPS filed another dependency petition (the 2007 petition), and Layla was again removed from her parents' custody, seven months after she had last been returned to them. She was placed with her paternal aunt, with whom she had resided when she previously had been removed from the parents' custody.

¶5 The 2007 petition was based, in part, on the following allegations that Dewayne did not contest: he was unable to parent Layla because of his substance abuse, as evidenced by the drugs and drug paraphernalia found in the home during the recent search; Layla had been the subject of a prior dependency proceeding; and Dewayne had failed to fully comply with required drug tests during the first dependency proceeding. ADES filed a motion to terminate both parents' rights in early October 2007 on the grounds of chronic substance abuse and because Layla had been removed from her parents' custody within eighteen months of having been returned to them. *See* § 8-533(B)(3), (11). Layla was adjudicated dependent shortly after the motion to terminate was filed.

¶6 The juvenile court ordered a concurrent case plan of reunification and severance and adoption and that the parents be provided with various services, including supervised visits with Layla, drug testing and treatment, and psychological evaluations. Dewayne challenges the sufficiency of the evidence establishing he was unable to discharge his parental responsibilities as § 8-533(B)(11)(d) requires and asserts the court's findings in this regard were against the weight of the evidence. To the extent Dewayne suggests the law

is unclear how to determine whether a parent has failed to discharge his or her parental responsibilities, we disagree. As Division One of this court has previously found, the phrase “unable to discharge parental responsibilities,” as used in § 8-533, “is not intended to encompass any exclusive set of factors but rather to establish a standard which permits a trial judge flexibility in considering the unique circumstances of each termination case before determining the parent’s ability to discharge his or her parental responsibilities.” *In re Maricopa County Juv. Action No. JS-5894*, 145 Ariz. 405, 409, 701 P.2d 1213, 1217 (App. 1985).

¶7 CPS case manager Wesley Miner testified at the January 2008 contested severance hearing about Dewayne’s lengthy history of drug use. He opined that the discovery of illegal drugs and drug paraphernalia in the family home just a few months after Layla had been returned to her parents showed Dewayne was unable “to make good decisions” regarding Layla. Dr. Elena Parra, the psychologist who evaluated Dewayne in October 2007, and whose report the juvenile court considered at the severance hearing, reported that Dewayne has “a number of personality characteristics that have been associated with substance use or abuse problems [and] . . . there is a possibility of his developing an addictive disorder.” Additionally, Parra stated that “given his past drug use and his MMPI findings it is likely that he might be either underestimating his drug use or he may be at risk for relapse.” Noting that she may not have had access to all the information about Dewayne, Parra recommended reunification of the family, explaining that, if

reunification were to occur, Dewayne would need to continue drug abuse monitoring for at least six months. Parra also found that, “[g]iven [Dewayne’s] depressed mood, and his Post Traumatic Stress Disorder condition it is very important that he remains drug free in order to prevent parental neglect.”

¶8 Despite having told Dr. Parra that he had been drug free for the three years before the October 2007 evaluation, Dewayne tested positive for methamphetamine in September 2007, just one month before the evaluation. He also tested positive for the prescription drug oxazepam in December 2007 and January 2008. Although he claimed he was taking the drug for a post-traumatic stress condition, Dewayne never provided a prescription to support his claim, nor did he indicate he was taking it under a physician’s direction when given the opportunity to do so at the time of testing. In addition, Dewayne was terminated from Arizona Families FIRST, a substance abuse treatment program, for having failed to comply with the terms of that program. Donald Thomas, Dewayne’s clinical therapist who testified at the severance hearing, characterized as sporadic Dewayne’s inconsistent attendance at sessions intended to deal with his substance abuse issues.

¶9 Notably, case manager Miner opined that, based on Dewayne’s lengthy history of substance abuse, his recent positive drug tests, and his noncompliance with substance abuse treatment, his drug abuse was “very likely to continue.” Miner testified that the parents

have proven over . . . Layla’s lifespan that they are unable to provide her a permanent and stable home as a result of their

substance abuse. Layla has spent the majority of her life with [the maternal aunt who] . . . is willing to care for . . . Layla as long as needed and [is] willing to adopt her.

In his progress report, prepared just before the severance hearing, Miner recommended the parents' rights be terminated. He emphasized that "Layla needs a safe, secure, and reliable environment that is free from drugs and criminal behavior" and that "[d]ue to [Dewayne's] continuing to test positive for substances it is clear that his 28 year history of drug use (which began with marijuana and progressed to the last 13 years of methamphetamine use and now prescription drug abuse) will continue and thus child neglect will also continue."

¶10 The record contains reasonable evidence to support the juvenile court's severance order, including its determination that Dewayne is currently unable to discharge his parental responsibilities. Because the court's ruling was not clearly erroneous, we affirm the order terminating Dewayne's parental rights to Layla.

JOHN PELANDER, Chief Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

J. WILLIAM BRAMMER, JR., Judge